Supreme Court, U.S.
FILED

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No. 98-___ 981160 JAN 19 1999

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In The

Supreme Court of the United States

October Term, 1998

SAUL NAVAS, et al.,

Cross-Petitioners,

v.

JANET RENO, et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Cross-petitioners, longtime legal permanent residents, are subject to final orders of deportation on the basis of the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) made by Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA). Cross-petitioners have sought review of that decision in the court of appeals by direct review as well as in the district court by habeas corpus. The court of appeals held that jurisdiction is proper in the district court under 28 U.S.C. 2241, that its own direct review jurisdiction was repealed and, on the merits, that the Attorney General incorrectly applied Section 440(d) retroactively. The government contends that no court has jurisdiction to review the Attorney General's retroactivity decision and that, if reviewable, the decision is correct. The questions presented are:

1. Whether AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the district courts and the courts of appeals over cross-petitioners' statutory and constitutional challenges to their final deportation orders and, if so, whether AEDPA and IIRIRA violate the Suspension of Habeas Corpus Clause, Article III or the Due Process Clause of the Constitution.

2. Whether AEDPA 440(d) applies retroactively and, if so, whether it violates the Constitution.

PARTIES TO THE PROCEEDING

Cross-petitioners are Saul Navas and Franklin Henderson. Cross-respondents are Janet Reno, the Attorney General of the United States; Doris Meissner, the Commissioner of Immigration and Naturalization; the Immigration and Naturalization Service (INS); and Edward McElroy, District Director of the INS in New York.

OPINIONS BELOW

Saul Navas and Franklin Henderson, respondents in *Reno v. Navas*, No. 98-996, refer the Court to the Opinions Below section in Respondents' Brief in Opposition in No. 98-996, filed simultaneously with this cross-petition on January 19, 1999, and to the government's Petition for Certiorari, which was docketed on December 18, 1998.

JURISDICTION

Cross-petitioners refer the Court to the Jurisdiction section in Respondents' Brief in Opposition to Certiorari in No. 98-996, filed simultaneously with this cross-petition on January 19, 1999, and to the government's Petition for Certiorari, which was docketed on December 18, 1998.

STATUTES OR OTHER PROVISIONS INVOLVED

Cross-petitioners refer the Court to the Statutes or Other Provisions Involved section in the Petition for Certiorari and Respondents' Brief in Opposition in No. 98-996.

STATEMENT

Saul Navas and Franklin Henderson conditionally cross-petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit that the court of appeals lacked jurisdiction over their petitions for review. Cross-petitioners Navas and Henderson request that this conditional cross-petition be granted if the Court grants the petition filed by the Solicitor General in *Reno v. Navas*, No. 98-996. Navas and Henderson, however, oppose the grant of that

petition. *See* Respondents' Brief in Opposition, *Reno v. Navas*, No. 98-996 (filed January 19, 1999).

The Board of Immigration Appeals (BIA) issued Navas and Henderson final orders of deportation on March 14, 1997 and March 21, 1997, respectively. Pet. App. 80a, 332a. The BIA based its orders on *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997) (Pet. App. 80a, 332a), in which the Attorney General held that Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277, applied retroactively to deprive legal permanent residents like Navas and Henderson of statutory eligibility to apply for relief from deportation under Section 1182(c) of the Immigration and Nationality Act (INA).

Navas and Henderson filed both habeas corpus petitions in district court and petitions for review directly in the court of appeals pursuant to 8 U.S.C. 1105a, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546. Henderson's habeas petition is still pending in district court. Navas' habeas petition was granted on July 11, 1997. Pet. App. 82a. The district court held that it had jurisdiction over Navas' petition pursuant to 28 U.S.C. 2241, and that Section 440(d) of AEDPA cannot be applied retroactively. Pet. App. 203a-05a. The government appealed.

The court of appeals consolidated the government's appeal from the district court's grant of habeas relief in Navas' case, Navas' and Henderson's petitions for review and the government's appeals from the district courts' grants of habeas relief to Mojica and Yesil (two other immigrants who are also respondents in *Reno v. Navas*). *See* Pet. Br. 14-15. In the consolidated cases, cross-petitioners challenged the BIA's final orders of deportation on the grounds that (1) the Attorney General

erred as a matter of law when she held in *Matter of Soriano* that AEDPA 440(d) applied retroactively to cases pre-dating AEDPA's enactment, and (2) if applicable, Section 440(d) violates the Constitution.

With regard to jurisdiction, cross-petitioners sought judicial review of both their constitutional and statutory claims either in a habeas corpus action in district court or by a petition for review in the court of appeals. The court of appeals dismissed Navas' and Henderson's petitions for review, and held that they are entitled to raise both their constitutional and statutory claims in district court habeas corpus actions. Pet. App. 58a-59a. The court of appeals then affirmed the district court's judgment in Navas' habeas corpus action, holding that Section 440(d) cannot be applied retroactively to bar Navas from Section 1182(c) relief. *Id.*

The government filed a petition for *certiorari* to this Court. The government contends that the court of appeals had jurisdiction on direct review over Navas' and Henderson's constitutional equal protection claims. Pet. Br. 23 ("AEDPA and IIRIRA do not bar a criminal alien from raising a constitutional challenge to a provision of the INA itself in the court of appeals"). It further asserts that jurisdiction over any other claim that is reviewable must lie exclusively in the court of appeals, but contends that no court has jurisdiction to hear cross-petitioners' retroactivity claim. *Id.* The government argues, however, that if Navas' and Henderson's statutory claims were reviewable, review should occur "in the court of appeals on petition for review. . . . [because] [s]uch a construction of the immigration laws would be far more harmonious with Congress's design than is the result reached by the courts of appeals." Pet. Br. 23 n.13. Regarding the merits, the government contends that the Attorney General's conclusion in *Soriano* is correct. Pet. Br. 26.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the event the Court grants the government's *certiorari* petition in *Reno v. Navas*, No. 98-996, Navas and Henderson request that this conditional cross-petition be granted as well. The cross-petition is filed as a protective matter to ensure that the Court perceives no impediment to addressing the merits issue if *certiorari* is granted on the circuit court's ruling regarding the retroactivity of AEDPA 440(d). If the Court grants the government's petition to consider the temporal scope of AEDPA 440(d), cross-petitioners would seek affirmance of the Second Circuit's merits ruling regardless of whether jurisdiction over that claim lies in a district court habeas corpus action or in the court of appeals by direct review.

As the government recognizes in its reply brief in *Magaña-Pizano*, the instant conditional cross-petition will present the Court with the Section 440(d) merits issue in both the petition for review and the habeas corpus context. Reply Brief for the Petitioners [INS et al.], *INS v. Magaña-Pizano*, No. 98-836 (pet. for cert. filed Dec. 18, 1998) [hereinafter "*Magaña-Pizano* Reply Br."] 9-10. As the government further acknowledges, *Reno v. Goncalves* is a flawed vehicle for reviewing the temporal scope of Section 440(d) because Goncalves filed only a habeas corpus action. In *Goncalves*, therefore, the Court would reach the merits *only* if it finds that jurisdiction properly lay in the district courts in a habeas corpus action. *Magaña-Pizano* Reply Br. 9-10. Unlike *Goncalves*, this case, along with the instant conditional cross-petition, presents the Court with a complete vehicle for addressing the temporal scope of Section 440(d).

CONCLUSION

For the reasons stated, in the event the petition for *certiorari* filed in No. 98-996 is granted, this conditional cross-petition should be granted as well.

Respectfully submitted,

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